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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Norma Mining Company,
Appellant,

vs.

Hugh Mackay,
Appellee.

BRIEF ON BEHALF OF APPELLANT

RICHARD E. SLOAN,
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BRIEF ON BEHALF OF APPELLANT

This is an appeal from a decree entered in the District Court of the United States for the District of Arizona, in a suit brought by Hugh Mackay, appellee, vs. The Norma Mining Company, appellant, to foreclose two mortgages, one given to secure a note for $16,000.00 and another given to secure two promissory notes, one in the sum of $3,500.00 and another in the sum of $1,500.00, both mortgages covering a group of forty-six patented mining claims situate in the Indian Secret Mining District, Mohave County, Arizona, and the notes and mortgages purporting to have been executed by The Norma Mining Company to Hugh Mackay, the first bearing

date August 2, 1913, and the second bearing date March 31, 1914. From the decree entered in favor of Hugh Mackay foreclosing the said mortgages, the Norma Mining Company has brought this appeal.

STATEMENT OF FACTS

The appellant, the Norma Mining Company, is a corporation organized under the laws of the State of Arizona. It acquired the group of mining claims hereinbefore referred to by purchase in 1905. At the time of the transaction that lead to the execution of the mortgages sued upon, R. T. Root was President of the Company, and his son W. W. Root was Secretary of the Company; each of them held one share of the capital stock of the Company. The wife of R. T. Root, Mrs. A. F. Root, owned in her own name at the time nearly all of the stock of the Company, in fact all but sufficient of the stock to qualify three directors. For many years prior to August, 1913, R. T. Root and Hugh Mackay, the appellee, had had various financial transactions involving the loan of money from one to the other, at times Mackay appears to have been indebted to Root and at other times Root appears to have been indebted to Mackay. On the 2d of September, 1911, Root gave a deed to Mackay to land in Colorado. At the time of the giving of this deed, Root was not indebted to Mackay as they had prior thereto had a complete settlement between them. At the time he gave the deed, Root also gave Mackay a check for $4,500. (Tr. pp. 66-69.)

Afterward at various dates Root obtained various sums of money from Mackay for which he gave his checks. In August, 1913, these checks approximated the sum of $10,000.00 The deed to the Colorado land Mackay held as security for these checks.

In July, 1913, Mackay found it necessary to raise $10,000 to make settlement of an estate of which he was executor. He applied to Root to raise him this money. (Tr. pp. 50-51), (also Defendant's Exhibit 34, p. 224.)

Root suggested as a method of raising money that Mackay should undertake to place a mortgage on the property of the Norma Mining Company, of which he was President. Acting upon this suggestion he executed the mortgage for $16,000 as the President of the Norma Mining Company on the mining property of the company on the 2d day of August, 1913. It was agreed that Mackay was to find some one who would take over the note and mortgage for $16,000 and from the proceeds to retain $10,000 represented by the Root checks, and to pay the balance over to Root, for what purpose does not appear.

At the time of the execution of the note and mortgage of August 2, 1913, Mackay gave Root a receipt which reads as follows:

"Received from R. T. Root a note for $16,000 of this date due to my order in 4 months, and a mortgage on 46 patented mining claims in White Hills, Mohave Co., Arizona, executed to me to secure said note, and both

the note and the mortgage are executed by the Norma Mining Company (an Arizona corporation), and said Root informs me that the said 46 mining claims stand in the name of said company on the records of said county.

I have recvd this mortgage and note for the purpose of selling them, and if sold pay for the proceeds recvd from their checks aggregating about $10,000.00 held by me as executor of the George Miller Estate, which said checks are signed by said Root, and after paying said checks the net balance recvd for said note and mortgage is to be turned over to said Root by me. Said Root says he is now negotiating for a loan upon said property. If he makes a loan he is to make a mortgage on said property and notify said Mackay and if Mackay has not sold said note and mortgage first referred to herein, he is to return same to me, or if said Mackay fails to sell said note and mortgage within one month from date he is to return them to me and the said mortgage first herein referred to is not to be recorded unless solid by said Mackay or his assistants. Said note and mortgage was first made for $20,000.00, but afterwards and before I received them they were changed to $16,000.00 in lieu thereof. (Signed) Hugh Mackay."

In the mortgage there appears this recital; "Thls instrument is hereby executed and delivered by R. T. Root as President, by order of the Board of Directors of this company and said execution and delivery is duly

ratified by a meeting of the stockholders of the company at which all shares of stock issued was represented and unanimously voted in favor thereof."

One of the issues raised by the answer of the appelland was whether in fact the mortgages were authorized by the stockholders of the Norma Mining Company or by its Board of Directors. The appellant denied that either its stockholders or its Board of Directors ever gave their assent to the execution of the notes and mortgages, or any of them while the appellee asserts the contrary. The minutes of the corporation did not disclose any action taken either by the stockholders or by the directors in relation to the matter. On the trial Mackay testified that he was present in Denver, Colorado, at a meeting of the stockholders and Board of Directors of the Norma Mining Company held on the 19th day of July, 1913, at which a resolution authorizing the execution of a note and mortgage up to the amount of $25,000 in favor of himself was adopted. (Tr. p. 52.) One, Frederick W. Lowry, who at one time was the secretary of Root, but who was as he testified employed by Mackay in 1913, testified that as a director of the Norma Mining Company he attended a meeting Denver on said date at which Mr. R. T. Root and W. W. Root and Hugh Mackay were present, and that he dictated a resolution authorizing the execution of a note and mortgage or notes and mortgages, by the Norma Mining Company to Hugh Mackay, in amounts up to

$25,000; that the resolution so prepared by him was adopted but that the same was not dated or signed by any of the directors nor was, so far as he knew, any minutes of said meeting taken and recorded, but that a typewritten copy of the resolution so prepared by him but undated and unsigned as aforesaid, was left by him and placed as a loose sheet in the minute book of the compauy. (Tr. pp. 100-105.)

One, Elmer Sykes, testified to having seen Root, Mackay and Lowry in the office of Mr. Lowry about the time of the alleged meeting. The stenographer employed by Lowry at the time, a Miss Saunders, also testified that Mr. Lowry gave her a copy of a resolution about the time of the alleged meeting and that she wrote the same on her typewriter, and that she saw Mr. Root, Mr. Mackay and Mr. Lowry go into the office of the latter about the same time but that she was not present and did not know what occurred therein.

On the other hand, Mr. R. T. Root testified that no such meeting was held at any such time or place and no such resolution adopted by the stockholders or by the Board of Directors. (Tr. pp. 38-40.) Mr. W. W. Root, Secretary of the Company, also so testified. (Tr. pp. 146147.) In the same behalf it was shown that Mr. Lowry's written resignation as director of the company had been filed as early as 1911. Mr. R. T. Root testified that this resigantion was accepted on July 15, 1911, and H. M. Root appointed in his stead. (Tr. p. 31.)

The minutes of the Board of Directors confirm this testimony.

Hugh Mackay, appellant, testified that a day or two before the 19th of July, 1913, R. T. Root had suggested the giving of the note and mortgage and that he stated to him that "it would be all right" because the Norma Mining Company was indebted to him in the sum of about $30.000. (Tr. pp. 51-52.) R. T. Root testified that the Norma Mining Company was not indebted to him at the time and denied having so stated. (Tr. pp. 37-38.) There was no attempt to prove this indebtedness by any record of the company. Lowry stated that there had been such a record but no effort was made to produce it or have it produced. He stated the indebtedness was for money expended by Root on the property of the company. Root testified that the money so expended by him was money belonging to his wife, who was the principal stockholder of the company. (Tr. pp. 37-38.)

It appears that Mackay made some effort to dispose of the $16,000 note and mortgage but failed to find anyone to take them. On March 31, 1914, another mortgage was executed by R. T. Root as President of the Norma Mining Company and attested by W. W. Root, Secretary, and delivered to Mackay as security for two promissory notes, one in the sum of $3,500 and the other in the sum of $1,500, both purporting to be the notes of the company payable on or before May

1, 1914. The latter mortgage covered the same group of 46 mining claims situate in Mohave County, Arizona, described in the mortgage for $16,000.00 In the second mortgage there was this recital: "The execution of this mortgage was duly authorized by a meeting of the stockholders of said, the Norma Mining Company, at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a resolution authorizing the execution and delivery hereof, and was authorized by resolution of its Board of Directors duly adopted by unanimous vote at a meeting at which all the directors of said company were present."

The circumstances connected with the giving of the latter mortgage appears to have been as follows: Mr. Mackay was unable to dispose of the $15,000 mortgage so upon the suggestion of Root, the smaller mortgage was made out and Mackay undertook to dispose of it for $4,000, or if he so desired to take it for himself in the sum of $4,000. After its execution Mackay gave Root a check for $1,810.00. Subsequently, as Mackay testified, he advanced certain moneys and paid certain expenses of certain trips made for the benefit of Root which brought the amount up to $4,000.

It was admitted in evidence that the Norma Mining Company did not receive any money whatsoever, either from Mr. Root or Mr. Mackay, or any one else, in any of the transactions connected with the execution of

the notes and mortgages or thereafter. What money passed between Mackay and Root related entirely to their individual affairs and had no connection whatever with the business of the company. Some time during the year 1914, Mackay placed both mortgages of record and thereafter brought this suit to foreclose the same.

SPECIFICATIONS OF ERROR

The appellant contends that the learned District Court erred in the following respects:

I.

In finding that the notes and mortgages sued upon were valid obligations of the Norma Mining Company when the proof fails to show that the appellant company at any time ever received anything of value for or on account thereof, and that the purpose for which said notes and mortgages were issued was a corporate purpose.

II.

In finding that the notes and mortgages sued upon were valid obligations of the Norma Mining Company when the proof fails to establish that the making, execution and delivery of the same were authorized by the appellant company.

III.

In rendering its decree finding that said notes and mortgages were valid obligations of the appellant company when the proof shows that they or either of them were not authorized by the appellant company and they or either of them were not made, executed and delivered for a corporate purpose and they or either of them were not made, evecuted and delivered for any consideration moving from the apellee thereof to the appellant company.

IV.

In finding that there was due and owing from the ap-

pellant company to the appellee on the $16,000 note and mortgage the sum of $18,434.66 when the proof shows that if said note and mortgage ever became a valid obligation of the appellent company, said obligation was for the sum of $10,000 and no more.

V.

In finding that there was due and owing on the notes and mortgages dated March 31, 1913, the sum of $4,523.43 when the proof shows that if said note and mortgage ever became a valid obligation of the appellant company the amount due thereon from said appellant company as shown by the evidence was the sum of $1.810.00 and interest at 6 per cent from the date thereof.

VI.

In striking from the deposition of Mrs. A. F. Root, a witness for the appellant, the answer of said witness made in response to an interrogatory in that behalf denying that she had stated in the presence of witnesses for the appellee that she knew of the execution and delivery of the notes and mortgages sued upon at the time they were alleged to have been executed and delivered and of a meeting of the stockholders and Board of Directors of the Norma Mining Company on July 19, 1913.

VII.

In striking the answer of Mrs. A. F. Root made in the aforesaid deposition made to an interrogatory that

she was the owner of all the shares of stock of the Norma Mining Company except three shares.

VIII.

In striking the answer of said witness made in said deposition to an interrogatory that the Norma Mining Company was not indebted to R. T. Root in any amount at the time of the execution of said notes and mortgages.

POINT.

I.

The Court Erred in Finding That the Notes and Mortgages Sued Upon Were Valid Obligations Of the Appellant Company for the Following Reasons: First, Because the Proof Fails to Show That R. T. Root Was Authorized by the Company to Execute the Same, and Second, Because the Proof Fails to Show That Any Corporate Purpose Was Served Thereby Or That Any Consideration Was Received Therefor.

Upon the question as to whether the notes or mortgages were authorized by the appellant company, while admitting that the evidence is conflicting, appellant nevertheless contends that the appellee has failed by his proof to establish that fact. The only authorization claimed or attempted to be shown by the appellee was that alleged to have been given at a meeting of the stockholders and Board of Directors of the Norma Mining Company at the office of the witness Lowry in Denver on the 19th day of July, 1913. No other act of authorization was attempted to be shown. No reference or mention of any such meeting is found in the minute book of the company. The appellee Mackay testified that he attended such a meeting in the office of the witness Lowry and that the meeting was held at the suggestion of R. T. Root. (Tr. pp. 50-52.)

Frederick W. Lowry testified that he was at one time

the secretary of R. T. Root but that prior to July, 1913, he had ceased to be employed by Root and had entered the employ of appellee Mackay; that as a director of the Norma Mining Company he attended a meeting of the Board of Directors held in his office at Denver, the 19th day of July, 1913; that at the suggestion of Mr. Root he wrote out a form of resolution and record of the meeting for use in the minutes; that he dictated to his stenographer, a Miss Saunders, a form for this resolution and minutes of the meeting, who made a typewritten copy of the same; that this copy was left without date and without any signature and as a loose sheet of paper in the minute book of the company. He stated that the purported resolution authorized a mortgage or mortgages to be issued to Mr. Mackay in a sum of $25,000 and that the consideration the company was to receive was the cancellation of an indebtedness from the company to Mr. Root for whatever amount the mortgages might be issued. He stated there was presenat at the meeting R. T. Root, W. W. Root, appellee McKay and himself. (Tr. pp. 100-103.)

One, Elmer Sykes ,testified that he was associated with Lowry and occupied the same office with him in July, 1913; that on July 22d he saw Mr. R. T. Root, Mr. Mackay, Mr. Lowry and W. W. Root at the office of Mr. Lowry in Denver; and that there was a meeting held on that day and that during the meeting Mr. Lowry came out and handed Miss Saunders a paper to

typewrite, and that the paper thus handed to Miss Saunders was in Mr. Lowry's handwriting and purported to be the resolution and minutes referred to by Mr. Lowry. Upon cross-examination Sykes stated that he was positive the meeting was not on July 19th but on July 22d. He knew that for the reason that Lowry was out of the city on July 19th. (Tr. pp. 130-134.)

Miss Jessie Saunders testified that she was employed in Lowry's office in July, 1913, and identified a copy of a resolution and minutes which she stated she wrote for Mr. Lowry, and that on the day of the meeting she saw R. T. Root, W. W. Root, Hugh Mackay and Frederick W. Lowry at the office of the latter. (Tr. p. 120.) On the other hand, R. T. Root testified positively that no such meeting was held (Tr. pp. 39-40), as did also W. W. Root. (Tr. p. 147.)

If we were left to the testimony of the witnesses alone, the fact of such a meeting would be a matter of grave doubt, particularly when we consider that the records of the company show that Lowry in July, 1913, was not a director of the company, and that there was a sharp conflict between the witnesses for appellee as to the date of the meeting. But the mortgages themselves and letters put in evidence written by appellee after the alleged meeting point inevitably to the conclusion that no such meeting was held. In both mortgages it is recited that they were authorized by the stockholders and directors of the company. R. T. Root in his testimony stated

that when the first mortgage was executed there was the distinct understanding between him and Mackay that if the latter should find a purchaser for the note and mortgage there should then be a meeting called for the purpose of having the company authorize the execution of the same. (Td. p. 40). The fact that no date of such meeting was given in the recital of the mortgage and the place where any such meeting was held, was not given therein, sustains Root in this testimony. In addition to the recitals in the mortgages there is shown in evidence a letter written by Mackay to Root dated July 21, two days after Mackay and Lowry stated the meeting had been held and one day previous to the date when Sykes stated the meeting was held. See Defendant's Exhibit 34, (Tr. p. 224). In this letter Mackay is pressing Root to do something toward relieving him of his embarrassment with reference to the $10,000 due the Miller estate. He could not possibly have written such a letter had there been a meeting of the Norma Mining Company and a note and mortgage authorized by said Company on that day for the purpose o f doing that which he states in his letter he was urging Root to do. The same is true if a meeting had been arranged for and was to be held on July 22nd. If any such meeting had been held or contemplated, some mention or reference would certainly have been made therein. Then again, attention is called to Defendant's Exhibit 35, (Tr. p. 225) being the reply by Root to Mackay of

the latter's letter of July 21st, in which no reference is made to any such meeting or to any such plan of raising the money proposed at said meeting according to Mackay's testimony and agreed to by Root. The reading of the record is convincing that the giving of the notes and mortgages was not authorized by any act of the corporation and that the attempt to show this grew out of a necessity on the part of the appellee of establishing the validity of the notes and mortgages as against the corporation.

If, as we contend, there was no authorization given by the company for the execution of the notes or mortgages or either of them, then it must follow that they are not valid obligations of the defendant company.

It cannot be contended successfully that a President of a company may bind the company by a transfer of its assets either as security or otherwise unless authorized so to do, or unless after such transfer, his act be ratified by the company.

Again if any such authorization as claimed was given by the company before the company can be bound by the notes and mortgages sued upon, Mackay not being an innocent purchaser the transaction must appear to have been for a corporate purpose and based upon a good consideration.

A corporation may not be held liable as a mere accommodation maker of notes and mortgages when executed for a purpose other than for which it was organized.

2 Cook on Corporations (4th Ed.) p. 1754.
Hutchinson vs. Sutter Mfg. Co. 57 Fed. 998
National Park Bank vs. German-American M. W. Co. 116 N. Y. 281 s. c. 22 N. E. 367.
Hall vs. Turnpike Co. 27, Cal. 255.

It is likewise well settled that no officer of the company, even if he should control practically all of the stock of the company, may deed or mortgage the assets of the company for other than a corporate purpose.

2 Cook on Stock and Stockhelders (3d Ed.) Sec. 708,
Humphreys vs. McKissock, 140 U. S. 304,
Fitzgerald vs. N. P. Ry. Co., 45 Fed. 812.
A. T. & S. F. Ry. Co. vs. Cochran, 23 Pac. 155,
Bank of Monroe vs. Gifford, 32 N. W. 669,
Gulf Etc. Ry. Co., vs. Morris, 4 S. W. 156,
Hopkins vs. Roseclan L. Co. 72 Ill. 373.

Then again the proof wholly fails to show that the company received any consideration for the execution of the notes and mortgages or either of them. The appellee attempted to show such a consideration by attempting to show that The Norma Mining Company was indebted to R. T. Root and that the consideration received for the notes and mortgages was the discharge of this indebtedness. There is, however, no sufficient proof that any such indebtedness existed. The records of the company did not show any such indebtedness. R. T. Root testified that the company was not indebted to him in 1913. Mrs. Root in her deposition also stated that there was no such indebtedness. To be sure, this

answer was stricken by the Court upon the ground that it was not rebuttal testimony and therefore not admissible. We think the Court was in error in this ruling and we shall argue hereafter that this Honorable Court should consider the evidence as properly in the record.

The witness Lowry stated that the records of the company at one time showed it was indebted to Root, and that this indebtedness was for money expended by Root on the property prior to 1912. Root stated in explanation of this, that he expended money on the property some years prior to 1912; that the property was bought by Mrs. Root in 1905 and then transferred to the company; that the money he expended on the property was money furnished by her and was not money of his own and that he had never made any claim to be reimbursed by the company for any such outlay. (Tr. p. p 37-38). If the company was in fact indebted to Root it must have been for a debt of long standing and one that was incurred years before the execution of the notes and mortgages. It seems remarkable that the records of the company should not disclose such an indebtedness or some claim upon the part of Root when we consider that the Statute of Limitations in this State bars such a claim within three years.

The appellee Mackay, in a letter written to Root in 1914, shown in the record as Defendant's Exhibit 28, (Tr. p. 218) speaks of the property of the Norma Mining Company as being free from any lien and inferentially

from any claim whatsoever. The date of this letter is August 27, 1914. As shown by the letter, he still held the mortgage under the original agreement for the purpose of placing the same for the benefit of himself and Root. If any indebtedness was due Root from the Company, that indebtedness must have existed at the date of this letter, for the company up to that time had paid nothing on the note and received nothing from Root.

The trial court could not have had all the facts in mind in rendering his decree else he could not have possibly reached the conclusion that the Norma Mining Company received any consideration for the execution of the notes and mortgages upon the theory that an indebtedness due Root was discharged thereby in whole or in part.

If there was no indebtedness discharged by the giving of the notes and mortgages, then it follows that they could not and did not become valid obligations of the company.

Germania Safety Co. vs. Boynton, 71 Fed. 797,
Central Trust Co., vs. C. H. V. & T. Ry. Co., 87 Fed. 815.

POINT.

II.

The Court Erred in Rendering Any Decree Finding That Either the Notes or Mortgages Sued Upon Were Valid Obligations of the Appellant Company.

In order to sustain the decree the proof must show, first, that the execution of the notes and mortgages sued upon were authorized by the appellant company and second, that the company received some consideration therefor.

Neither one of these facts was clearly proven at the trial. The evidence tending to show authorization of the notes and mortgages is as we contend clearly insufficient to establish that fact. The slight evidence introduced by appellee tending to show an indebtedness due from the Norma Mining Company to Root in 1913, was overcome by the positive statements of Root that there was no such indebtedness and by his uncontradicted statement that the money that may have been paid out under his direction on the company's property was not his own but the money of Mrs. A. F. Root, his wife, and by the fact that no company record was shown or attempted to be shown showing any such indebtedness.

The indebtedness testified to by Lowry, if it was ever incurred, was incurred prior to 1912, before the execution of the notes and mortgages. The Statute of Limitations in Arizona bars debts of this sort in three years. If there was any such indebtedness recognized by the

company or by Root, it seems remarkable that it should have existed for years without some record having been made of it or some claim having been presented or some effort made to keep it alive. An inspection of the record will make it evident that the matter of indebtedness due from the company to Root was an afterthought on the part of appellee to give seeming validity to the notes and mortgages.

POINT.

III.

The Court Erred in Finding That There Was Due Under the Notes $18,523.43 On the First Mortgage And the Sum of $4,523.43 On the Second Mortgage Sued Upon.

The $16,000 note and mortgage was executed August 2, 1913. Contemporaneously with the execution of the note and mortgage, a paper was signed by Hugh Mackay purporting to be a receipt for the note and mortgage in which it is recited that the mortgage and note were received for the purpose of selling them and from the proceeds paying an indebtedness of Root's of $10,000 due Mackay as executor of an estate, and in which it is further recited that after the payment of the $10,000, the balance of the proceeds of said note and mortgage was to be paid over to Root. Inasmuch as this suit is against the Norma Mining Company and the property to be foreclosed is the property of the Norma Mining Company, if, as recited in the mortgage, authority was given by the stockholders and directors of the company for the execution of the note and mortgage, such authorization must have been given in view of the conditions stated by Mackay in said paper, namely, that the indebedness due Mackay to be taken care of by the note and mortgage was the $10,000 named therein.

The statement is made by Mackay in the receipt (Tr. p. 192) that if the note and mortgage should be sold for

more than $10,000 the balance was to be paid to Root, but as the note and mortgage was not so disposed of but retained by Mackay as security for the amount due him, that amount must be limited to the $10,000. An examination of Mackay's testimony will disclose that at the time of the execution of the $16,000 note and mortgage he computed the indebtedness due from Root at approximately $10,000.00. It is true that his statements are very much involved in unecrtainty, but sufficient appears to indicate that what Mackay had in mind at the time was some method by which he could raise the sum of $10,000 to settle with the estate of which he was executor. Lowry, appellee's witness, so testified. (Tr. p. 101). This is manifest, not only by the receipt which has been referred to above, but by his letter to Root dated July 21, 1913, two days after the alleged meeting of the Norma Mining Company at Lowry's office, which letter is shown in the record as Defendant's Exhibit 34, and which conclusively shows that fact. (Tr. p. 224.) The letter written by Root dated July 24, 1913, in answer to Mackay's letter of July 21, 1913, shown in the record as Defendant's Exhibit 35, (Tr. p. 225) requests Mackay not to "take the checks to the bank" and states that he would pay the money to him direct and if there was any mistake or error in the account for which the checks were given, he would correct it. Mackay in his testimony attempted to show that the mortgage was given to secure a larger

sum, part of which he states was interest upon what he terms the Lowry Loan, (Tr. p. 72) (also Defendant's Exhibit 28, Tr. p. 218), which is irreconcilable with his letter and Root's reply as well as the receipt given by Mackay at the time of the execution of the note.

These two papers corroborate the testimony of Root to the effect that the mortgage of $16,000 was made and delivered for the purpose of borrowing money on the same from some third person, the proceeds of which was to pay checks held by Mackay as executor to the amount of $10,000 and the balance to be paid to Root. While possibly it may be that, had Root been the owner of the property mortgaged, upon the failure of Mackay to borrow the money thereon, he could then have held the same, not only as security for the $10,000 in checks, but for other indebtedness due from Root, he certainly had no right to include other sums than that for which the note was executed and charge these additional sums against the property of the Norma Mining Company without its consent. Assuming that it did assent to the execution of the original note and mortgage, there is nothing in the record to show that such assent covered other transactions than those included in the mortgage at the time of its execution. In other words, Mackay cannot charge against the Norma Mining Company any indebtedness not secured by the mortgage itself and include such indebtedness in the mortgage lien. We

submit that it clearly appears in the record that even if it be assumed that the Norma Mining Company authorized the execution and delivery of the $16,000 note and mortgage, having the power to give such authorization, that in such event the indebtedness secured by the mortgage did not extend beyond the $10,000 due Mackay as the executor of the Miller Estate for which the mortgage was given, and that the decree should be modified to the extent of eliminating therefrom the di-f ference between $10,000 and $16,000 and interest on said difference at 6 per cent from August 2, 1913, to the date of the rendition of the decree.

Again the amount obtained by Root under the second mortgage was the sum of $1,810.00. (Tr. p. p. 60-63). The mortgage did not contain any provision covering future advances. As said above in relation to the $16,-000 mortgage, the second mortgage if authorized, can only secure the amount for which it was originally given. Mackay undertook to show that after the loaning of the $1,810 on the second mortgage, Root became indebted to him in other sums for expenses of certain trips and certain small personal loans. (Tr. p. p. 60-63-188.) The reason for giving the mortgage for $5,000 clearly appears as already shown was that Mackay should place the same with some third party for their mutual benefit. Appellant contends therefore that the decree should be further modified, in case the Court should be of the opinion that the notes and mortgages are valid obliga-

tions and enforcible against appellant, to the extent of eliminating the further sum of $2,190 with interest thereon at the rate of 6 per cent per annum from March 31, 1914, to the date of the rendition of the judgment.

POINT.

IV.

The Court Erred in Striking Out From the Deposition of Mrs. A. F. Root Her Statements That She Did Not Know of the Execution of the Notes and Mortgages at the Time of the Execution and That At That Time the Company Was Not Indebted to Root in the Sum of $30,000 Or Any Other Sum.

No question was raised as to the competency, relevancy or materiality of the interrogatories or that the answers were not properly responsive. The objection made to the answers was that they were not rebuttal testimony and a ruling of the Court in excluding the answers was based upon that objection. (Tr. p. 155).

The trial court was under the impression that the testimony of the witness on the subject of her knowledge of the execution of the mortgages on the Norma Mining Company's property and of her interest in the property and also of the indebtedness due the company from R. T. Root in 1913, were matters that should have been anticipated by the appellant so as to require it to introduce proof before resting its case. The fact was that the deposition of Mrs. Root was taken by leave of the court after the case had been partially tried. The record, however, does not disclose that in fact the appellant had rested its case when the adjournment was had for the taking of this and other depositions. No good reason, therefore, appears from the record for the exclusion

of the evidence upon the ground that it was not rebuttal. The case is analagous to that of one where the trial is continued for the production of additional evidence. The evidence as to her knowledge of the execution of the notes and mortgages was material, in view of the statement of Mackay that she had at or about the time of the execution of the $16,000 mortgage, talked to him about it and evinced a knowledge of its execution, and her statement as to any indebtedness due Root from the Norma Mining Company at the time, in view of the statements of the witness Lowry, and also of the witness appellee Mackay was likewise material.

We think the Court erred in striking the answers of the witness from her deposition and in refusing to admit the same in evidence. While it may not have been reversible error, we think that this Honorable Court should disregard the ruling of the trial Court to the extent of considering the deposition and statements of the witness in its bearing upon the questions of fact to which the latter related.

POINT.

V.

The Court Erred in Entering a Deficiency Judgment Against Appellant.

The only reason fo rentering a deficiency judgment in this case would be that the debt secured was that of appellant. It is clear upon any theory of the facts that the debts secured by the mortgages given were the personal debts of R. T. Root. There is, therefore, no basis for the deficiency judgment.

I respectfully submit that this decree should be reversed for the reasons given.

Respectfully submitted,

RICHARD E. SLOAN,

Attorney for Appellant.

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